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Federal Habeas Corpus and Maryland Post-Conviction Remedies

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Comments and Casenotes

FEDERAL HABEAS CORPUS AND MARYLAND POST-CONVICTION REMEDIES

By ABEL J. MERRILL

In recent years the Supreme Court's application to the states, through the Fourteenth Amendment, of concepts of due process of law has radically changed the standard of what is constitutionally permissible in state administration of criminal law. Convictions valid at the time entered would be unconstitutional by today's standards.[1] Further, some of the new doctrines have been applied retroactively,[2] and others seem on the threshhold of retrospective application.[3]

It is for these reasons, in addition to their inherent importance, that post-conviction remedies have become increasingly significant not only to persons whose constitutional rights recently have been infringed but also to those long ago convicted who seek to become the beneficiaries of constitutional change.

Foremost among these remedies is federal habeas corpus. The high prerogative writ of habeas corpus,[4] providing for the release of persons illegally deprived of their liberty, has often been described in Anglo-American jurisprudence as a bulwark of freedom and safeguard against

[1] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961), *rehearing denied*, 368 U.S. 871 (1961), holding that state convictions based on illegally seized evidence, hitherto valid, are now unconstitutional, and Gideon v. Wainwright, 372 U.S. 335 (1963), declaring the right of indigent defendants to counsel in all "serious" criminal cases. See Comment, *The Right to Counsel for Indigents in State Criminal Trials*, 23 Md. L. Rev. 332 (1963).

[2] Hall v. Warden, 313 F. 2d 483, 494 *et seq.* (4th Cir. 1963), *cert. denied*, 31 U.S. L. Week 3407 (U.S. June 10, 1963), and Walker v. Pepersack, 316 F. 2d 119 (4th Cir. 1963). But *cf.* Gaitan v. United States, 317 F. 2d 494 (10th Cir. 1963), and Linkletter v. Walker, 32 U.S.L. Week 2137 (U.S. September 24, 1963) (5th Cir.). For a discussion of problems of retroactive application, see Note, *Prospective Overruling And Retroactive Application In The Federal Courts*, 71 Yale L.J. 908 (1962).

[3] See opinion of Sobeloff, C.J., concurring specially, in Jones v. Cunningham, 319 F. 2d 1, 4-5 (4th Cir. 1963); and Yaeger v. Director, 319 F. 2d 771 (4th Cir. 1963). See also Mihelcich et al. v. Wainwright, 84 Sup. Ct. 80 (1963).

[4] Referring to habeas corpus ad subjiciendum. See 25 Am. Jur. 145, Habeas Corpus, Sec. 4, and 3 Blackstone's Commentaries, 129-132, for other writs of habeas corpus.

arbitrary action of government officials. The right to the writ in cases of unlawful imprisonment has existed in the United States from the time this nation became independent.[5] The framers of the Constitution accordingly provided that the writ shall not be suspended except in extreme cases of public danger.[6]

The modern federal writ of habeas corpus has been provided for by Congress in 28 U.S.C. § 2241, which invests the federal courts with power to restore the liberty of any person held, in custody, *inter alia*, in violation of the Constitution or laws or treaties of the United States.[7] The fact that the petitioner is held under authority of a state cannot affect the question of the power or jurisdiction of the proper federal court to inquire into the cause of his commitment and to discharge him if he is held in restraint of his liberty within the terms of the statute,[8] as habeas corpus has the nature of original, and not appellate, jurisdiction.[9]

It was not intended by Congress, however, that the courts of the United States should obstruct the ordinary enforcement of the criminal laws of the states in state tribunals by issuing writs of habeas corpus.[10] Thus, the federal courts observe the salutary principle that they should interfere with due and orderly administration of justice in the state courts by issuing writs of habeas corpus only in exceptional cases, as where there is an interference with rights under the federal constitution or federal laws.[11]

It was out of respect for this principle of federalism that Congress enacted 28 U.S.C. § 2254, providing for "exhaustion of state remedies", which declares:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

[5] Goetz v. Black, 256 Mich. 564, 240 N.W. 94, 96, 84 A.L.R. 802 (1932). For a history and analysis of federal habeas corpus, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 411 (1963).

[6] U.S. Const., Art. I, § 9, Cl. 2.

[7] 28 U.S.C. § 2241. See also Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461 (1960), for a statistical survey of federal habeas corpus, and a discussion of proposed legislation to change federal habeas corpus jurisdiction.

[8] Ex parte Royall, 117 U.S. 241 (1886); In re Neagle, 39 Fed. 833, 842-843 (C.C. N.D. Cal. 1889), *aff'd*, 135 U.S. 1 (1890).

[9] Fay v. Noia, 372 U.S. 391, 430-431 (1963).

[10] Irvin v. Dowd, 359 U.S. 394, 404-405 (1959); Tinsley v. Anderson, 171 U.S. 101, 104-105 (1898).

[11] Ex parte Royall, *supra*, n. 8, pp. 251-252. The exercise of federal habeas corpus jurisdiction has often been the subject of criticism by state judges and law officers. See Desmond, *Federal Habeas Corpus Review of State Court Convictions*, 50 Geo. L.J. 755 (1962). (The author, Charles S. Desmond, is the Chief Judge of the New York Court of Appeals.)

> State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The Supreme Court has construed this statute to be declaratory of prior case law and to have the effect, except in extraordinary circumstances, of assuring that the states have the primary responsibility for adjudicating the merits of a claim of deprivation of federal constitutional rights. Normally it is only after the state has had a full opportunity to do so that the federal courts will intervene.[12] The presentation of such claims in the state courts is thus a condition precedent to the exercise of federal habeas corpus jurisdiction.

Section 2254 has three distinct clauses, stating that the writ shall not be granted unless (1) there has been an exhaustion of state remedies, or (2) "there is . . . an absence of available State corrective process", or (3) there is "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." The scope of this comment is limited to a discussion of normal exhaustion problems within the terms of the first clause.[13]

What are the state remedies open to one convicted in Maryland which he must normally pursue before federal habeas corpus is available? In most circumstances he must make both direct and collateral attacks on his judgment of conviction. The differences in the nature of the two reme-

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[12] Ex parte Hawk, 321 U.S. 114, 116-117 (1944), codified in 28 U.S.C. § 2254; Mooney v. Holohan, 294 U.S. 103, 115 (1935); United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13, 17 (1925); Urquhart v. Brown, 205 U.S. 179, 181-182 (1907); Tinsley v. Anderson, *supra*, n. 10; United States *ex rel.* Jackson v. Brady, 133 F. 2d 476, 481 (4th Cir. 1943).

[13] It is to be remembered, however, that, when factual situations falling within clauses (2) and (3) are presented, there is no requirement of exhaustion. These are normally cases of "exceptional circumstances." For a discussion of "exceptional circumstances" situations, see *Habeas Corpus — Jurisdiction — Exhaustion of State Remedies as Prerequisite to Federal Relief*, 57 Mich. L. Rev. 128, 129-130 (1958). See also n. 19 to 28 U.S.C. § 2254. See Hall v. Warden, *supra*, n. 2, for a recent example. However, as a result of aspects of Fay v. Noia, discussed *infra*, the "exceptional circumstances" doctrine will probably diminish in importance.

dies is crucial for the defendant, as will be indicated. "A direct attack on a judgment or decree is an attempt . . . to have it annulled, reversed, vacated, corrected, declared void, or enjoined, *in a proceeding instituted for that specific purpose,* such as an appeal, writ of error, bill of review, or injunction to restrain its execution. . . ."[14] A collateral attack, on the other hand, is "[A]n attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect *in some incidental proceeding* [which is] not provided by law for the express purpose of attacking it. . . ."[15]

DIRECT REMEDIES

In Maryland, direct review of a judgment of conviction is available both by motion for new trial and direct appeal. Although a motion for new trial is a state court procedure available to fully preserve defendant's rights for purposes of federal habeas corpus jurisdiction, it has been the practice in the United States District Court for the District of Maryland to hold that failure to make such motion does not prejudice the petitioner. The filing of a motion for new trial by the accused in a criminal prosecution is a matter of right and not of judicial discretion,[16] although the granting of such motion is in the discretion of the court;[17] from an order denying such motion, no appeal will lie.[18] Any ground upon which a defendant may have been prejudiced may be raised by motion for new trial.[19]

Before instituting federal habeas corpus proceedings, a state prisoner must exhaust not only the processes of the state court of original jurisdiction but also any appellate review afforded by the state.[20] In Maryland, appeal from

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[14] BLACK, LAW DICTIONARY (4th ed. 1957) "Direct Attack", p. 546. (Emphasis supplied.)

[15] Trustees of Somerset Academy v. Picher, 90 F. 2d 741, 744 (1st Cir. 1937). (Emphasis supplied.)

[16] 3 MD. CODE (1957) Art. 27, § 594, as construed by Bell v. Warden, 218 Md. 666, 668, 146 A. 2d 56 (1958); McCutheon v. Warden, 215 Md. 616, 618-619, 138 A. 2d 369 (1958); Brigmon v. Warden, 213 Md. 628, 631-632, 131 A. 2d 245 (1957), *cert. denied,* 354 U.S. 927 (1957).

[17] Ayala v. State, 226 Md. 488, 493, 174 A. 2d 160 (1961); Thomas v. State, 215 Md. 558, 561, 138 A. 2d 878 (1958); Ford v. Warden, 214 Md. 649, 652, 135 A. 2d 894 (1957).

[18] Hitchcock v. State, 213 Md. 273, 285, 131 A. 2d 714 (1957); Givner v. State, 208 Md. 1, 4, 115 A. 2d 714 (1955); Williams v. State, 204 Md. 55, 66, 102 A. 2d 714 (1954). Such motion must be filed within three days after reception of verdict. MD. RULES 759a and 567a.

[19] See 7 M.L.E., *Criminal Law* §§ 502-504 (1960).

[20] Ex Parte Royall, *supra,* n. 8, 253; Ex parte Fonda, 117 U.S. 516, 518 (1886); United States *ex rel.* Kennedy v. Tyler, *supra,* n. 12, 19.

a judgment of conviction to the Court of Appeals is a matter of right in a criminal case, except where there has already been an appeal from a conviction by a magistrate or judge of the Municipal Court of Baltimore to a circuit court, sitting in an appellate capacity.[21]

The scope of direct appeal, however, is strictly limited. It covers complaints "directed to the regularity of the trial and not to the jurisdiction of the court, and . . . [to] matters which were incident to the trial, and for which remedies were available before and during the original trial. . . ."[22] The Court of Appeals also can review errors of law committed by the lower court in its rulings,[23] sufficiency of the evidence to sustain a conviction in a criminal case tried before a jury,[24] and constitutional questions affecting jurisdiction,[25] all of which also may be raised collaterally.[26]

Certain specific allegations must be raised directly only, or they are waived. It is, therefore, important for a defendant to appeal from his conviction if he is relying on one of these allegations, since his failure to do so may bar subsequent Maryland collateral relief.

The following allegations may be raised by direct attack only and consequently may not be raised collaterally — sufficiency of the evidence,[27] legality of arrest,[28] irregular-

[21] 1 MD. CODE (Cum. Supp. 1962), Art. 5, § 12, enacted in 1961, and approved by referendum of November, 1962. §§ 12 and 12A provide for appeals to the Court of Appeals from convictions imposed by the Criminal Court of Baltimore in the exercise of its appellate jurisdiction. MD. RULES 772 and 812a provide that an appeal must be taken within thirty days from the date of the appealed judgment.

[22] Blevin v. Warden, 223 Md. 645, 646, 162 A. 2d 444 (1960).

[23] Slansky v. State, 192 Md. 94, 107, 63 A. 2d 599 (1949); Florentine v. State, 184 Md. 335, 40 A. 2d 820 (1945).

[24] Fisher v. Warden, 230 Md. 612, 185 A. 2d 198 (1962); Smallwood v. State, 216 Md. 16, 17, 139 A. 2d 242 (1958), *cert. denied*, 357 U.S. 912 (1958), *habeas corpus granted*, 205 F. Supp. 325 (Md. 1962); Craig v. State, 214 Md. 546, 547, 136 A. 2d 243 (1957); Daniels v. State, 213 Md. 90, 108, 131 A. 2d 267 (1957); see 7 M.L.E., *Criminal Law* § 762, at 520.

[25] *E.g.*, the validity of the statute upon which the sentence was based; Beard v. Warden, 211 Md. 658, 660-661, 128 A. 2d 426 (1957); jurisdiction over the subject matter, Bowen v. State, 206 Md. 368, 375, 111 A. 2d 844 (1955); legality of sentence, Weinecke v. State, 188 Md. 172, 178, 52 A. 2d 73 (1947); Taylor v. State, 187 Md. 306, 317, 49 A. 2d 787 (1946). 7 M.L.E., *Criminal Law* § 721, at 503.

[26] See discussion of collateral attacks in text accompanying n. 58 *et seq.*, *infra*. For detailed discussion of scope and extent of review of the Court of Appeals in a criminal case, see 7 M.L.E., *Criminal Law* §§ 721-747. See also Markell, *Review of Criminal Cases in Maryland by Habeas Corpus and By Appeal*, 101 U. Pa. L. Rev. 1154, 1163 *et seq.* (1953).

[27] Price v. Warden, 220 Md. 643, 645, 151 A. 2d 166 (1959), *cert. denied*, 361 U.S. 848 (1959); Barbee v. Warden, 220 Md. 647, 650, 151 A. 2d 167 (1959).

[28] Roberts v. Warden, 223 Md. 638, 639, 161 A. 2d 456 (1960), *cert. denied*, 364 U.S. 850 (1960).

ities in preliminary proceedings,[29] newly discovered evidence,[30] guilty plea erroneously entered or wrongfully induced,[31] clerical error,[32] defective indictment,[33] disparity between sentences imposed upon applicant and his codefendant,[34] error in trial tactics,[35] failure to seasonably demand a free transcript or file a motion for new trial or appeal,[36] indigence as an excuse for failure to appeal,[37] promise of leniency for pleading guilty,[38] erroneous advice of counsel,[39] ineptitude of counsel,[40] failure of counsel[41]

[29] Price v. Warden, *supra*, n. 27; Whitley v. Warden, 222 Md. 608, 611, 158 A. 2d 905 (1960), *cert. denied*, 364 U.S. 808 (1960), *habeas corpus denied sub nom.*, Whitley v. Steiner, 293 F. 2d 895 (4th Cir. 1961); Rice v. Warden, 221 Md. 604, 605, 156 A. 2d 632 (1959); Niblett v. Warden, 221 Md. 588, 590-591, 155 A. 2d 659 (1959); Chislom v. Warden, 223 Md. 681, 682-683, 164 A. 2d 912; Holt v. Warden, 223 Md. 654, 162 A. 2d 743 (1960); Culley v. Warden, 217 Md. 660, 661, 143 A. 2d 61 (1958), *cert. denied*, 358 U.S. 848 (1958).

[30] Daniels v. Warden, 223 Md. 631, 632, 161 A. 2d 461 (1960); Diggs v. Warden, 221 Md. 624, 626, 157 A. 2d 453 (1960); Barbee v. Warden, *supra*, n. 27, 650.

[31] Dobson v. Warden, 220 Md. 689, 691, 154 A. 2d 921 (1959), *cert. denied*, 362 U.S. 954 (1960), *habeas corpus denied*, 188 F. Supp. 599 (D. Md. 1960); Person v. Warden, 217 Md. 650, 651, 141 A. 2d 743 (1958), *cert. denied*, 358 U.S. 853 (1958); Wagner v. Warden, 205 Md. 648, 652, 109 A. 2d 118 (1954). However, in extreme cases, this allegation may be raised collaterally: Warrington v. Warden, 222 Md. 601, 604, 159 A. 2d 360 (1960); Slack v. Warden, 222 Md. 626, 631, 160 A. 2d 924 (1960).

[32] Lander v. Warden, 224 Md. 666, 168 A. 2d 348 (1961); Reed v. Warden, 212 Md. 645, 646, 129 A. 2d 92 (1957); Carter v. Warden, 210 Md. 657, 659-660, 124 A. 2d 574 (1956), *cert. denied*, 352 U.S. 900 (1956), *habeas corpus denied*, 242 F. 2d 750 (4th Cir. 1957).

[33] Wilson v. Warden, 222 Md. 580, 582, 158 A. 2d 103 (1960), *cert. denied*, 364 U.S. 841 (1961).

[34] Cothorn v. Warden, 221 Md. 581, 582, 155 A. 2d 652 (1959); Ellinger v. Warden, 224 Md. 648, 653, 167 A. 2d 334 (1961), *cert. denied*, 366 U.S. 951 (1961).

[35] Hall v. Warden, 224 Md. 662, 665-666, 168 A. 2d 373 (1961), *cert. denied*, 368 U.S. 867 (1961), *habeas corpus denied*, 201 F. Supp. 639, 642 (D. Md. 1962), *rev'd on other grounds*, 313 F. 2d 483 (4th Cir. 1963); Rayne v. Warden, 223 Md. 688, 690, 165 A. 2d 474 (1960), *cert. denied*, 365 U.S. 854 (1961), *habeas corpus denied*, 198 F. Supp. 552 (D. Md. 1961); Spencer v. Warden, 222 Md. 582, 584, 158 A. 2d 317 (1960), *appeal dismissed*, 223 Md. 678, 164 A. 2d 522 (1960); Barker v. Warden, 208 Md. 662, 666-667, 119 A. 2d 710 (1956).

[36] Henson v. Warden, 223 Md. 674, 675, 164 A. 2d 273 (1960), *cert. denied*, 364 U.S. 938 (1961); Truesdale v. Warden, 221 Md. 617, 621, 157 A. 2d 281 (1960); McClung v. Warden, 221 Md. 596, 155 A. 2d 893 (1959).

[37] Scott v. Warden, 223 Md. 667, 670-671, 164 A. 2d 270 (1960); Wilson v. Warden, *supra*, n. 33.

[38] Edwards v. Warden, 221 Md. 575, 576, 155 A. 2d 903 (1959), *cert. denied*, 362 U.S. 971 (1960).

[39] Parker v. Warden, 222 Md. 598, 158 A. 2d 762 (1960); Diggs v. Warden, 221 Md. 624, 626, 157 A. 2d 453 (1960).

[40] Phillips v. Warden, 224 Md. 671, 672-673, 168 A. 2d 516 (1961); Warrington v. Warden, *supra*, n. 31, 603; Scott v. Warden, 222 Md. 596, 597-598, 158 A. 2d 761 (1960).

[41] Cooper v. Warden, 225 Md. 630, 169 A. 2d 419 (1961).

or of the court[42] to advise of the right to appeal, instructions to the jury,[43] prejudice of the trial court,[44] drunkenness at time of plea,[45] perjury,[46] innocence,[47] coerced confession,[48] denial of right to counsel,[49] admission of illegally seized evidence,[50] excessiveness of sentence within the maximum authorized by law,[51] double jeopardy,[52] convic-

[42] Scott v. Warden, *supra*, n. 37, 671; Dorris v. Warden, 222 Md. 586, 587, 158 A. 2d 105 (1960).

[43] Matthews v. Warden, 223 Md. 649, 650-651, 162 A. 2d 452 (1960).

[44] Fisher v. Warden, *supra*, n. 24, 199; Price v. Warden, *supra*, n. 27, 645.

[45] Parker v. Warden, *supra*, n. 39, 599-600.

[46] As distinguished from allegation of *knowing use* of perjured testimony by state officials, Washington v. Warden, 225 Md. 623, 625, 169 A. 2d 419 (1961); Fisher v. Warden, 225 Md. 642, 643, 171 A. 2d 731 (1961); Wilson v. Warden, *supra*, n. 33, 581-582; State v. D'Onofrio, 221 Md. 20, 29-30, 155 A. 2d 643 (1959).

[47] Fisher v. Warden, *supra*, n. 24, 199; Fisher v. Warden, *supra*, n. 46, 643; Turner v. Warden, 220 Md. 669, 155 A. 2d 69 (1959), *cert. denied*, 364 U.S. 885 (1960), *petition for writ of habeas corpus denied without hearing*, Civil No. 12025, D. Md., Feb. 27, 1961, *remanded for hearing*, 303 F. 2d 507 (4th Cir. 1962), *habeas corpus denied*, 206 F. Supp. 111 (D. Md. 1962); Barbee v. Warden, *supra*, n. 27.

[48] Trader v. Warden, 226 Md. 672, 673, 174 A. 2d 439 (1961); Cheeseboro v. Warden, 224 Md. 660, 662, 168 A. 2d 181 (1961), *cert. denied*, 368 U.S. 846 (1961); Whitley v. Warden, *supra*, n. 29, 897.

[49] Young v. Warden, 221 Md. 584, 585, 155 A. 2d 677 (1959); Willis v. Warden, 220 Md. 692, 154 A. 2d 916 (1959); Tillett v. Warden, 220 Md. 677, 680, 154 A. 2d 808 (1959); but where the denial is in a case involving an unusually serious charge, as in Klein v. Warden, 229 Md. 621, 182 A. 2d 810 (1962), the allegation is available collaterally; Brown v. Warden, 228 Md. 654, 179 A. 2d 419 (1962), *appeal denied*, 230 Md. 629, 186 A. 2d 595 (1962). As these cases were decided while Betts v. Brady, 316 U.S. 455 (1942), was the controlling law as to right to counsel, it would seem that they should be of little effect today in light of Gideon v. Wainwright, 372 U.S. 335 (1963); White v. State, 373 U.S. 59 (1963), and other recent Supreme Court decisions changing the law in this area.

[50] Ralph v. State, 226 Md. 480, 487, 174 A. 2d 163 (1961), *cert. denied*, 369 U.S. 813 (1962), 203 F. Supp. 752 (D. Md. 1962), *sub nom.*, Ralph v. Warden, 230 Md. 616, 185 A. 2d 366, 368 (1962), *habeas corpus denied*, 218 F. Supp. 932 (D. Md. 1963); and Trader v. Warden, *supra*, n. 48, decided subsequent to Mapp v. Ohio, 367 U.S. 643 (1961); Hall v. Warden, *supra*, n. 35, 664; Ward v. Warden, 222 Md. 595, 158 A. 2d 770 (1960), *cert. denied*, 363 U.S. 816 (1960); Warrington v. Warden, *supra*, n. 31, 603, decided prior to Mapp v. Ohio. Recently, Hall v. Warden, reversing the District Court, held that Mapp is retrospective in application, in capital cases at least, with the effect that state convictions upon illegally seized evidence, valid at the time of their decision under Wolf v. Colorado *may* successfully be attacked by federal habeas corpus. Judge Thomsen, in Young v. Warden, 213 F. Supp. 854 (D. Md. 1963), in deference to the Maryland courts, invited them to apply the Mapp rule in *state collateral proceedings*, before the U.S. District Court took such action on federal habeas corpus.

[51] Wallace v. Warden, 226 Md. 670, 671-672, 174 A. 2d 435 (1961); Frazier v. Warden, 223 Md. 686, 165 A. 2d 463 (1960); Roberts v. Warden, 223 Md. 635, 161 A. 2d 668 (1960).

[52] Campbell v. Warden, 226 Md. 668, 669, 174 A. 2d 174 (1961); Preston v. Warden, 225 Md. 628, 629-630, 169 A. 2d 407 (1961), *cert. denied*, 366 U.S. 974 (1961); Roberts v. Warden, *supra*, n. 51; Young v. Warden, 218 Md. 636, 638, 145 A. 2d 238 (1958). But see Wampler v. Warden, — Md. —, 191 A. 2d 594, 597-598 (1963), for an exception.

tion under an *ex post facto* law,[53] sanity at time of trial,[54] or conviction under an unconstitutional statute.[55]

COLLATERAL

Maryland collateral attacks on judgments of conviction are governed by the Uniform Post Conviction Procedure Act. The act provides a defendant with a choice of two approaches, either (1) a statutory UPCPA proceeding, or (2) one of the remedies which existed prior to the enactment of the UPCPA, such as a common law writ of habeas corpus, coram nobis or other common law or statutory remedy.[56] When a collateral proceeding is prosecuted as a statutory one, any person, including the state, aggrieved by the order of the court or judge, passed in accordance with the act, may, within a thirty day period, apply to the Court of Appeals for leave to prosecute an appeal. If it is the petitioner to whom leave is granted, he may have a delayed appeal from the original judgment of conviction.[57] It would seem, therefore, that exhaustion of Maryland

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[53] Torres v. Warden, 227 Md. 649, 653-654, 175 A. 2d 594 (1961), *cert. denied*, 369 U.S. 890 (1962).

[54] Wagner v. Warden, *supra*, n. 31; *Cf.* Webster v. Warden, 211 Md. 632, 634, 126 A. 2d 613 (1956). However, failure to raise the allegation by appeal in the state court has not precluded review by federal habeas corpus. Massey v. Moore, 348 U.S. 105, 109 (1954); Thomas v. Cunningham, 313 F. 2d 934 (4th Cir. 1963).

[55] Loughran v. Warden, 192 Md. 719, 723-724, 64 A. 2d 712 (1949), *cert. denied*, 337 U.S. 908 (1949). See annotations, 3 MD. CODE (1963 Supp.) Art. 27, § 645A, p. 101, *et seq.*, for an exhaustive listing of allegations which may be raised only directly. Some of these are matters of state law and procedure and not involving constitutional issues and thus may not serve as the basis for a writ of habeas corpus in the federal courts. Buchalter v. New York, 319 U.S. 427, 429-430 (1943); Judy v. Pepersack, 284 F. 2d 443 (4th Cir. 1960), *cert. denied*, 366 U.S. 939 (1961); Goodman v. Swenson, 192 F. 2d 669, 670 (4th Cir. 1951); Wright v. Brady, 129 F. 2d 109 (4th Cir. 1942); Roberts v. Pepersack, 190 F. Supp. 578, 581 (D. Md. 1960). As "it is only in circumstances impugning fundamental fairness or infringing specific constitutional protection that a federal question is presented." Grundler v. State of North Carolina, 283 F. 2d 798, 802 (4th Cir. 1960). Where any of these allegations present such circumstances, they are available to be raised collaterally, either in the state courts [see text accompanying ns. 66 and 67, *infra*] or in the federal courts [see text accompanying n. 82, *infra*].

[56] 3 MD. CODE (Cum. Supp. 1962) Art. 27, § 654A *et seq.* This is Maryland's version of the Uniform Act. See Note, *The Maryland Version of The Uniform Post Conviction Procedure Act, With Special Reference to The Writ of Habeas Corpus*, 19 Md. L. Rev. 233 (1959), for a discussion of the act, written prior to MD. LAWS 1962, Ch. 36, § 1, which makes significant changes in the original act. See Sansbury v. Pepersack, 179 F. Supp. 649, 650 (D. Md. 1959), *aff'd*, 274 F. 2d 40 (4th Cir. 1960).

[57] 3 MD. CODE (Cum. Supp. 1962) Art. 27, § 645I; the Court of Appeals may then affirm, reverse, or modify the order of the court holding the UPCPA hearing, or may remand the case for further proceedings. The last alternative is the one most frequently used.

collateral remedies would include both motion for leave to appeal, and a delayed appeal, if granted. The purpose of the act is:

> " '[T]o bring together and consolidate into one simple statute all the remedies, beyond those that are incident to the usual procedures of trial and review, which are at present available for challenging the validity of a sentence of imprisonment . . . [It] is aimed to incorporate and protect all rights presently available under habeas corpus, coram nobis, or other remedies. The change is a procedural one' . . . [T]he Act does not create any new substantive rights or remedies that were not available prior to its enactment."[58]

"While the [U.]P.C.P.A. did not abrogate the remedies formerly available under writs of habeas corpus and coram nobis and other common law and statutory remedies, it clearly took away the right of appeal from an order denying any of them."[59] Collateral review under the UPCPA "is not a substitute for . . . remedies which are incident to the proceedings in the trial court . . . or any remedy of direct review of the sentence or conviction. . . ."[60] Thus, with several exceptions, allegations held to be reviewable directly[61] may not be raised collaterally. The UPCPA provides a forum for presentation of:

> *"[C]laims that the sentence or judgment was imposed in violation of the Constitution of the United States* . . . or that the court . . . was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that [claims] . . . grounds of alleged error *heretofore available* under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy. . . ."[62]

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[58] State v. D'Onofrio, *supra*, n. 46, at p. 29.

[59] Brady v. State, 222 Md. 442, 447, 160 A. 2d 912 (1960); 3 MD. CODE (Cum. Supp. 1962) Art. 27, § 645A(b). Today, collateral attacks by means of the UPCPA are less frequently used than are attacks by means of the common law writs, even though there is no appeal from denial of habeas corpus relief. From September, 1961 to August, 1962, 274 habeas corpus and 57 post-conviction petitions were passed upon in the Maryland courts. Annual Report, 1961-1962, Administrative Office of the Courts, State of Maryland, Table D-2, p. 70.

[60] 3 MD. CODE (Cum. Supp. 1962) Art. 27, § 645A(b). See also Olewiler v. Brady, 185 Md. 341, 44 A. 2d 807 (1945), for scope of habeas corpus relief prior to UPCPA.

[61] See ns. 27-55, *supra*.

[62] (Emphasis supplied.) 3 MD. CODE (Cum. Supp. 1962) Art. 27, § 645A(a).

The statute speaks of grounds of error which were "heretofore available". This phrase would seem to have the effect of fixing in point of time the then-existing concepts of the Fourteenth Amendment's due process clause and thus excluding UPCPA relief based upon subsequently recognized due process grounds, were it not for the provision that "claims that the sentence or judgment was imposed in violation of the Constitution of the United States. . . ."

But the UPCPA may be read as providing that *any* deprivation of defendant's federal constitutional rights may be raised collaterally. Further, the cases have held that where defendant's allegation is normally raised *only by direct attack,* but where the circumstances alleged are of such a nature as to violate his fundamental constitutional rights, his failure to make such attack does not prevent his making a collateral attack in the Maryland courts. As stated in *Hamilton v. Warden:*[63] "[H]abeas corpus was never designed to review the regularity of judicial proceedings, as an alternative to appeal, but there are exceptions to the rule, where the irregularity amounts to a deprivation of due process under the Fourteenth Amendment, which may render the trial void *ab initio.*"

Thus, where the defendant has received an adverse ruling on his federal constitutional claim after presentation by direct attack, he must then make a collateral attack in the state courts.[64] And even where defendant failed to present his federal claim by timely direct attack, he must still institute a Maryland collateral proceeding, in reliance on the language of the UPCPA as construed by *Hamilton v. Warden.*

ANOMALY

However, there is a definite inconsistency between the statutory provision as interpreted, which allows the hearing of certain allegations in collateral proceedings even though no appeal has been taken, and cases holding that certain allegations involving federal constitutional rights may be raised only directly. Although the former clearly allows for relief co-extensive with the expanded and expanding concepts of the Fourteenth Amendment due process clause,

[63] 214 Md. 633, 636, 136 A. 2d 251 (1957). See also Loughran v. Warden, *supra,* n. 55, 724-725, and Olewiler v. Brady, *supra,* n. 60, 344-345.

[64] Darr v. Burford, 339 U.S. 200, 207 (1950), overruled on other grounds, Fay v. Noia, *supra,* n. 9; Mooney v. Holohan, 294 U.S. 103, 115 (1935); Ex parte Williams, 317 U.S. 604 (1943); Ex parte Davis, 317 U.S. 592 (1942); Ex parte Botwinski, 314 U.S. 586 (1942).

the Court of Appeals has at times continued to rely on earlier cases limiting the scope of collateral attack,[65] thus hearings on collateral review of many federal allegations in the Maryland courts are often denied on the basis of "waiver", even though there is some question as to whether certain of these allegations are subject to "waiver" under federal law. This tendency has begun to change, at least at the nisi prius level, since decisions of the 1962 Term of the Supreme Court relating to Fourteenth Amendment substantive criminal law problems.[66]

Thus, if the allegations relied upon by a Maryland defendant may properly be raised only during the course of the trial, by motion for new trial or by appeal, and the defendant fails to take such proceedings within the prescribed time limits, he has, according to the Court of Appeals, waived the point and is foreclosed from relief in the Maryland courts.[67] The Court of Appeals bases its position on the language of the UPCPA itself that UPCPA relief is available only where ". . . the alleged error has not been previously and finally litigated *or waived* in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction."[68] This provision and its strict construction by the Maryland Court of Appeals has had the effect of denying a post-conviction hearing to those uneducated defendants who, by virtue of what is usually an innocent procedural default, have failed to make direct attacks.[69]

Chief Judge Thomsen of the United States District Court for the District of Maryland has succinctly pointed out the effect of the limitation on the number of federal constitutional claims which may be raised in a UPCPA proceeding:

> "It is true that a UPCPA proceeding is usually ineffective to secure a consideration by the Maryland

[65] See, *e.g.*, Wagner v. Warden, 205 Md. 648, 109 A. 2d 118 (1954).

[66] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[67] Such failure often had the additional effect of barring federal habeas corpus relief in the "abortive state proceeding" situation. However, it was suggested by Reitz prior to Fay v. Noia, 372 U.S. 391 (1963), that if such failure is unintentional, state prisoners should not be barred from relief because of the normal exhaustion requirements. Reitz, *Federal Habeas Corpus: Impact of An Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1367-1368 (1961).

[68] 3 MD. CODE (Cum. Supp. 1962) § 645A(a).

[69] "The great majority of the 200 cases disposed of by the Court of Appeals have been disposed of on the ground that habeas corpus cannot be used as an appeal or new trial. . . ." Markell, *Review of Criminal Cases in Maryland by Habeas Corpus and by Appeal*, 101 U. Pa. L. Rev. 1154, 1160 (1953). The author was speaking of cases arising after 1945, when the right of appeal from denial of habeas corpus relief was granted. The right to appeal was abolished by the UPCPA.

> State courts of the constitutional issues typically raised by petitions filed in this court seeking a writ of habeas corpus [citations omitted]. This court, however, is most reluctant to pass on the constitutionality of the rulings of the State courts until the State courts themselves have at least had an opportunity to review them. *It is not necessary in this case to decide how long we should continue to require obviously futile procedures. . . .*"[70]

Even where the Maryland courts hold a federal constitutional claim to be available on collateral attack, as in the case of knowing use of perjured testimony, a defendant is often denied a hearing because of the strict construction of his allegations.[71]

Where the allegation is a non-federal one, this foreclosure operates not only in the Maryland courts[72] but in the federal courts as well, and a defendant has no standing to seek federal habeas corpus relief, in part because such matters under the "adequate state ground doctrine", may not be considered in federal courts. In such cases, the federal court may declare that the petitioner either has not exhausted his state remedies, although the phrase as applied seems inaccurate since there is no further available state remedy for him to exhaust, or that he presents a non-federal ground which cannot be the basis for federal habeas corpus relief. It would seem more precise to say that the case had come to rest, or that denial of relief was based on adequate state grounds, or that no federal question is presented, with the result that federal relief is not available.

Collateral relief in the Maryland courts may be available even though defendant has failed to appeal, where

[70] Ralph v. Pepersack, 203 F. Supp. 752, 754 (D. Md. 1962). (Emphasis supplied.) Apparently alluding to the possibility that the UPCPA may later be construed not to be an "available state remedy" within the terms of 28 U.S.C. § 2254, which would mean that a defendant would not need to take a statutory UPCPA proceeding as a step in the process of exhaustion of state remedies. See Smallwood v. Warden, 205 F. Supp. 325, 330 (D. Md. 1962). Professor Reitz, prior to Fay v. Noia, expressed the opinion that the dilemma caused by state "waiver" rules could be solved by rejection of the "adequate state ground" rule, since the federal courts would then not be prevented from inquiring into the possible violation of federal constitutional rights because of formalistic procedural technicalities, *supra*, n. 67, 1352-1354. *Cf.*, the dissent of Justice Markell in Niemotko v. State, 194 Md. 247, 253, 71 A. 2d 9 (1950), stating that the position of the Maryland Court of Appeals, that ". . . Maryland criminal procedure — or lack of procedure — is supreme over the Constitution of the United States, . . ." causes petitioners to seek enforcement of their rights in the Supreme Court.

[71] *E.g.*, Clark v. Warden, 293 F. 2d 479 (4th Cir. 1961).

[72] See cases cited *supra*, n. 55, excluding Loughran v. Warden.

the following circumstances have been found: (1) a guilty plea obtained through deception by government officials;[73] (2) failure to appeal, where justified under some mitigating circumstances;[74] (3) knowing use of perjured testimony;[75] (4) state obstruction of defendant's right of appeal;[76] (5) "suppression by the State of evidence tending to exculpate a defendant;"[77] and (6) conviction for an offense not charged[78] — all of which are matters dehors the record of the trial proceeding.

Integral steps in the pursuit of collateral remedies are the filing of a motion for leave to appeal from a denial of post-conviction relief and the appeal, where such motion is granted, since appellate processes in collateral proceedings are also included in the exhaustion process.[79]

As the exhaustion of but one of several available alternatives is all that appears to be necessary,[80] a defendant choosing the option of collateral attack by way of the UPCPA apparently should not be required to take a common law habeas corpus proceeding. Likewise, if common law habeas corpus is the alternative chosen, a defendant should be required to take only one such proceeding based on the same allegation, even though the Maryland law provides that a defendant may take an unlimited number of habeas corpus proceedings before any circuit judge in the state.[81] However, where Maryland habeas corpus has been pursued, it has been the practice in the United States District Court for the District of Maryland for some judges

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[73] Warrington v. Warden, *supra*, n. 31, 604; Slack v. Warden, *supra*, n. 31, 630.

[74] State v. Shoemaker, 225 Md. 639, 171 A. 2d 468 (1961).

[75] Strosnider v. Warden, 228 Md. 663, 666, 180 A. 2d 854 (1962); Washington v. Warden, *supra*, n. 46; Fisher v. Warden, *supra*, n. 46.

[76] Spencer v. Warden, *supra*, n. 35.

[77] Strosnider v. Warden, *supra*, n. 75, 667.

[78] Bowie v. Warden, 230 Md. 607, 184 A. 2d 921 (1962).

[79] Ex parte Davis, 318 U.S. 412 (1943). Note that 28 U.S.C. § 2254 provides that "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[80] Brown v. Allen, 344 U.S. 443, 487 (1953), modified on other grounds by Fay v. Noia; Wade v. Mayo, 334 U.S. 672 (1948), although factually distinguishable, seems to support this proposition. See also the statement in Fay v. Noia, *supra*, n. 67, 435, that ". . . our decision today affects all procedural hurdles to the achievement of swift and imperative justice on habeas corpus. . . ."

[81] 4 MD. CODE (Cum. Supp. 1963) Art. 42, § 1. Section 4 provides, however, that the issuance of the writ is within the judge's discretion, in the exercise of which he should consider whether the applicant has previously been granted a full and adequate hearing and whether new and substantial grounds are being raised.

to also require pursuit of UPCPA relief, for purposes of satisfaction of exhaustion requirements.[82]

FROM DARR TO NOIA

Prior to *Fay v. Noia*,[83] decided in March, 1963, after adverse rulings in Maryland direct and/or collateral proceedings, the final step required before a defendant was deemed to have exhausted his state remedies for purposes of filing federal habeas corpus proceedings was normally a proceeding in the Supreme Court either by way of appeal[84] or by petition for *certiorari*.[85] Such was the holding of *Darr v. Burford*.[86]

"Special circumstances", however, justified departure from this rule, and where such circumstances existed, exhaustion, including *certiorari*, was not required.[87] It had been recognized that the term "exceptional circumstances" could not be defined effectively and that the various factors present in each case must be appraised before such circumstances could be found. The decisions in which "exceptional circumstances" have been found seem to be limited to two general situations: (1) cases involving clear state interference with federal power; and (2) cases where the very purpose of federal habeas corpus would be defeated by requiring the petitioner to follow through on state remedies before seeking federal relief, such as where the petitioner was scheduled to be executed before he could properly utilize the available state remedies.[88] The doctrine of "exceptional circumstances", however, was used sparingly because of considerations of federalism.[89]

The Court in *Darr v. Burford* also had rejected any distinction as to whether certiorari was a state or federal remedial procedure which had to be exhausted[90] and had required a petition for certiorari in cases arising from state courts. It adopted the "first crack" theory, based upon re-

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[82] See Rudolph v. Warden, Maryland Penitentiary, 217 F. Supp. 579 (D. Md. 1963), and Ward v. Pepersack, Civil No. 14573, D. Md., October 29, 1963.

[83] 372 U.S. 391 (1963).

[84] Provided for by 28 U.S.C. § 1257(1) or § 1257(2) — must be filed within 90 days of the judgment of the state court. S. CT. RULE 38½.

[85] Provided for by 28 U.S.C. § 1257(3) — same time limit as for appeals, *supra*, n. 84.

[86] 339 U.S. 200 (1950).

[87] Brown v. Allen, *supra*, n. 80; Frisbie v. Collins, 342 U.S. 519 (1952); Sunal v. Large, 332 U.S. 174 (1947).

[88] See *Habeas Corpus — Jurisdiction — Exhaustion of State Remedies Prerequisite to Federal Relief*, 57 Mich. L. Rev. 128 (1958).

[89] Frisbie v. Collins, 342 U.S. 519 (1952).

[90] *Supra*, n. 86, 212.

spect for principles of federalism, and stated[91] that, even though the denial of certiorari by the Supreme Court carried no weight in a subsequent federal habeas corpus proceeding, it was not a meaningless step to require, since it was the Supreme Court rather than the federal district court which should have been given the first opportunity to reverse state court judgments concerning local criminal administration as constitutionally inadequate.

The landmark decision of *Fay v. Noia*,[92] the impact of which is just beginning to be felt, undoubtedly will affect the fundamentals of the administration of criminal justice in both the state and federal systems. Noia and two co-defendants were convicted of felony-murder, the sole evidence against each being his signed confession. The co-defendants appealed unsuccessfully but were released in subsequent proceedings upon findings that their confessions had been coerced and their convictions procured in violation of the Fourteenth Amendment. After their release, Noia made application to the sentencing court by a petition in the nature of coram nobis; he was ultimately denied relief on the basis that failure to appeal from his judgment of conviction did not entitle him later to utilize coram nobis, even though the asserted error related to a violation of a federal constitutional right. Certiorari was denied.

Upon application for federal habeas corpus, the district court held a hearing limited to the facts surrounding Noia's failure to appeal. Noia gave indigence as his reason, although his trial attorney stated that Noia was also motivated not to appeal by fear that if successful he might get the death sentence if convicted on a retrial. Although it had been stipulated that the coercive nature of Noia's confession was established, the district court held that, because of Noia's failure to take a direct appeal, he must be denied relief under the provisions of 28 U.S.C. § 2254.[93] The Circuit Court of Appeals reversed.[94]

The Supreme Court held that Noia's failure to appeal was not a failure to exhaust state remedies as required by 28 U.S.C. § 2254 and could not *under the circumstances* be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief.

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[91] *Supra*, n. 86, 216-217.

[92] 372 U.S. 391 (1963).

[93] See text after n. 11, *supra*.

[94] U.S. v. Fay, 300 F. 2d 345 (2d Cir. 1962).

The Court announced the doctrines that: (1) 28 U.S.C. § 2254 refers only to a failure to exhaust remedies *still open to the applicant at the time he files his application for habeas corpus in the federal court;* (2) the federal courts have *power* under the federal habeas corpus statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; and (3) the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas corpus statute.

The Court stated, parenthetically, that the first doctrine was not meant to disturb settled principles of exhaustion of presently available state remedies.

The demise of *Darr v. Burford* had been foreshadowed by the per curiam denial of certiorari in *Mattox v. Sacks,*[95] in which the Supreme Court held that the failure to apply for certiorari within prescribed time limits was not a bar to the federal district court's hearing of Mattox's habeas corpus petition. But, in *Fay v. Noia,* the Supreme Court expressly overruled *Darr v. Burford*[96] to the extent that it barred federal relief if a petitioner had failed timely to seek certiorari, and it declared in dictum that henceforth the filing of a petition for certiorari in the Supreme Court would not be a necessary part of the exhaustion process.

Undoubtedly, the thorniest problem of federal habeas corpus was posed by the situation where the petitioner, asserting a deprivation of federal constitutional rights, had a remedy in the state courts but failed to avail himself of it and later found himself without a state remedy, as where he failed to take an appeal within the prescribed time limits. Although decisions dealing with "waiver" and certiorari handed down prior to *Fay v. Noia* are likely to be primarily of historic value today, they are helpful in understanding the nature of the problem.

Prior to *Fay v. Noia,* even where the allegation raised a question of abridgement of federal constitutional rights, federal habeas corpus was often barred where denial of state relief was based on an adequate state ground.[97]

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[95] 369 U.S. 656 (1962).

[96] *Supra,* n. 92, 435.

[97] Brown v. Allen, *supra,* n. 79, 458; Stembridge v. Georgia, 343 U.S. 541, 547 (1952); Dixon v. Duffy, 344 U.S. 143, 146 (1952); Cicenia v. Legay, 357 U.S. 504, 507-508 (1958), n. 2; Irvin v. Dowd, 359 U.S. 394, 410 (dissenting opinion), 412-413 (dissenting opinion) (1959); House v. Mayo, 324 U.S. 42, 48 (1945); *Cf.* White v. Ragen, 324 U.S. 760, 765-767 (1945). See Reitz, *supra,* n. 66, 1338 et seq., criticizing the application of the doc-

"Waiver" was often a further basis for such denial.[98] Thus, a state prisoner, in the example in the preceding paragraph, was foreclosed from relief in most cases.[99] Here, too, the courts often spoke of the situation as one of failure to exhaust state remedies.[100] Thus, it had been held that allegations of unreasonable search and seizure,[101] denial of right to counsel[102] and coerced confession[103] may be waived.

However, the lower federal courts, recognizing the dilemma caused by strict direct/collateral delineations, occasionally refused to be bound by state findings of "waiver". For example, the Fourth Circuit Court of Appeals, in *Whitley v. Steiner,* held that failure to make a state direct attack was excused where:

> "[T]he state court will consider the petitioner's federal claim in a habeas corpus or other proceeding, even though the prisoner failed to pursue some previous appropriate state remedy[104] . . . or even if the state court has ruled on the federal claims despite the existence of procedural grounds justifying abstention. . . . Another exception is where the alleged constitutional infirmity concerns the lack of counsel. . . . The same is

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trine to federal habeas corpus, stating that it is a limitation which should be peculiar to the appellate jurisdiction of the Supreme Court. But *cf.* Hart, *The Supreme Court — 1958 Term. Forward: The Time Chart of the Justices,* 73 Harv. L. Rev. 84 (1959), particularly pp. 116-118.

[98] Reitz, *supra,* n. 67, 1332-1338, which was critical of the "waiver" concept as applied to the Daniels v. Allen [reported with Brown v. Allen, *supra,* n. 80] situation, but approved the theory as applied to a Johnson v. Zerbst, 304 U.S. 458 (1938), situation of "intentional relinquishment or abandonment of a known right or privilege." This was the position taken by the Fay court. See also Hart, *supra,* n. 97, 118.

[99] Jennings v. Illinois, 342 U.S. 104, 109 (1951). See also Reitz, *supra,* n. 67, and Whitley v. Steiner, 293 F. 2d 895 (4th Cir. 1961) for annotated discussions of the divers theoretical bases of the foreclosure in the federal courts.

[100] Irvin v. Dowd, *supra,* n. 97, 406, inferring that § 2254 does bar resort to federal habeas corpus if petitioner has not obtained a decision which he could in the past have obtained from the highest state court. Daniels v. Allen, 344 U.S. 443 (1953).

[101] Whitley v. Steiner, *supra,* n. 99; Hazel v. Warden, 206 F. Supp. 142, 143 (D. Md. 1962); Smallwood v. Warden, *supra,* n. 70, 330; Hall v. Warden, 201 F. Supp. 639, 644-645 (D. Md. 1962), but reversed, 313 F. 2d 483 (4th Cir. 1963), because of a finding of exceptional circumstances.

[102] Whitley v. Steiner, *supra,* n. 99; Hazel v. Warden, *supra,* n. 101; Hall v. Warden, *supra,* n. 101. However, where the denial of counsel alleged is in a felony or otherwise extremely serious case, federal habeas corpus may be available. See Williams v. Kaiser, 323 U.S. 471, 477-478 (1945).

[103] Hall v. Warden, *supra,* n. 101.

[104] Whitley v. Steiner, *supra,* n. 99, *e.g.,* knowing use of perjured testimony. See Clark v. Warden, 293 F. 2d 479, 481 (4th Cir. 1961), n. 1 and cases cited therein.

> perhaps true of the claim that the conviction was upon perjured testimony knowingly used by state officials. . . . Still other exceptions are where no real opportunity was afforded to invoke the state procedure . . . or where state officials have interfered with the attempt to secure relief . . . or where the petitioner can present to the court reasons justifying his failure; or finally where exist particular circumstances which are deemed to justify federal action."[105]

It is to be noted, however, that the circumstances covered by the exceptions were rare and that further consideration by the federal courts of the merits of a habeas corpus petition was barred in an overwhelming percentage of cases, leaving the prisoner with no avenue of relief other than the unlikely event of executive clemency.

The impact of *Fay v. Noia* cannot be overemphasized, since, for all intents and purposes, it sounded the death knell of the waiver doctrine. As a result of *Fay v. Noia,* failure to appeal from a conviction in the state court, other than a knowing and intentional waiver, is no bar to federal habeas corpus relief.

Even though the Court was careful to circumscribe and restrict findings of waiver by declaring the standard of waiver to be "an intentional relinquishment of a known right or privilege",[106] the practical possibility of the Court's allowing a permissible finding of waiver appears to be highly unlikely, since the facts of *Fay v. Noia* seem to the dissent, and to this writer, to fall squarely within the Court's own definition of waiver.

The only vestige of the waiver doctrine left by the Court is its holding that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts, and in so doing has forfeited his state court remedies."[107]

The district court judge's range of discretion would appear to be extremely limited, if available at all, if *Fay v. Noia* is interpreted strictly, since, even though the facts

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[105] *Supra,* n. 99, 899-900. *Cf.* Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942). See also Brown v. Allen, *supra,* n. 97, 485-486, including incapacity as one of the exceptions. Thomas v. Cunningham, *supra,* n. 54; Hall v. Warden, *supra,* n. 101, treated as an exceptional circumstance petitioner's failure in the state courts to object to admission of illegally seized evidence in reliance on Wolf v. Colorado, 338 U.S. 25 (1949) and allowed him to avail himself of subsequently decided Mapp v. Ohio, 367 U.S. 643 (1961).

[106] 372 U.S. 391, 439 (1963), quoting from Johnson v. Zerbst, *supra,* n. 98.

[107] *Id.* at 438.

of the case appear to be a concrete example of "deliberate bypass", the Supreme Court granted relief. The more likely explanation is that the facts of *Fay v. Noia* were poorly fitted to its doctrines and that, in other factual situations, the doctrines will be more useful and in fact the federal district judge will be allowed the normal exercise of discretion in "deliberate bypass" cases. But the lack of a standard as to what does or does not constitute a waiver remains unclear, since the Supreme Court, in *Fay v. Noia*, set up its standard and then apparently ignored it.

In the light of the extremely appealing fact situation created by the freedom of Noia's co-defendants while he continued to be incarcerated,[108] the result reached in *Fay v. Noia* seems eminently fair, although the use of this case for the announcement of the Court's interpretation of the exhaustion doctrine seems unfortunate. Certainly the use of the "exceptional circumstances" principle would have provided a satisfactory solution to the case. Further, the Court had to strain to avoid finding waiver by petitioner.

On its merits, however, the new doctrine is sound because of its logical integrity and its consequences. Imprecision of language and thought and strained interpretations in waiver situations will be avoided. But most important, no longer will a simple procedural default by an unlettered and often indigent defendant become a bar to the attainment of substantive justice.

Although it addressed itself to the availability of federal collateral relief, the implications of *Fay v. Noia* for the states is clear. A Maryland defendant pressing an alleged deprivation of federal constitutional rights, who is barred from collateral relief in the Maryland courts by virtue of Maryland's waiver rules, now has the alternative of applying to the federal court for relief, and is assured of consideration of the merits of his claim. If his allegations are well founded, it is the federal court which will grant ultimate relief. It is to be expected that most state petitioners will make use of the federal courts as one of the *primary* forums for post-conviction litigation of their claims.

That this situation is undesirable is obvious. The federal courts are put in the position of a Maryland "Super-Court of Criminal Appeals", as final arbiters of the validity of many Maryland criminal proceedings. The consequent weakening of the federal system of government could result, not from a "power grab", but from judicial failure to accommodate to change.

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[108] *Cf.* Patterson v. Alabama, 294 U.S. 600 (1935).

The problem is not without a remedy. If the Maryland Court of Appeals were to reconsider its waiver rules and accommodate them to the standards of *Fay v. Noia,* Maryland courts could gain greater control of their administration of criminal justice, and the federal courts would need to intervene only in the unusual, rather than in the ordinary case. In the only reported case dealing with the problem, the Maryland Court of Appeals appeared reluctant to follow this course, although leaving the matter open.[109]

At the crux of the problem is the rigidity with which the Maryland Court of Appeals has insisted that certain allegations must be raised by appeal or be deemed waived. As has been illustrated,[110] a holding that a particular allegation must be raised directly has the necessary effect of making that allegation collaterally unavailable in Maryland. Unquestionably the state has a legitimate interest in establishing its own procedural rules and in requiring that certain allegations must be raised by appeal, if at all. Allegations of clerical error, of error in counsel's trial tactics, are examples. On the other hand, because of a state's duty to protect the federal constitutional rights of its citizens, it must be careful to see that state procedure does not impede or make impossible the hearing of federal constitutional allegations in state courts. When the state procedure makes such hearing impossible, whether intentionally or not, the primary duty of the federal courts to look to the enforcement of the federal constitutional rights of all citizens comes into play and the federal courts *must* intervene in situations in which they otherwise would not.[111]

It is submitted that Maryland's formidable classification of allegations which must be raised directly and may not be heard collaterally has the effect of preventing the lower courts from weighing the validity of certain allegations which do, in fact, assert deprivations of federal constitutional rights, and in turn not only allows but requires the federal court to intervene when called upon.[112] This is particularly so in light of the expanded concepts of due process of law made applicable to the states in recent

[109] Berman v. Warden, — Md. —, 193 A. 2d 551 (1963).

[110] See text accompanying n. 67, *supra.*

[111] *Cf.* Bartone v. U.S., 84 Sup. Ct. 21, 22 (1963). "Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceedings."

[112] 372 U.S. 391, 439: "Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question."

years, by which many matters, formerly considered procedural and within the exclusive province of state regulation, are now considered federal constitutional matters.[113]

Were the Maryland Court of Appeals to revise its rulings and make greater use of post-conviction remedies by allowing the hearing of any allegation which arguably raises federal constitutional grounds, it would not only better perform its federal constitutional duty by providing a fair hearing of federal constitutional allegations, but also fairly encourage the finality of litigation and strike a more appropriate balance within the framework of federalism.

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[113] "Through the long series of cases that began with Moore v. Dempsey [261 U.S. 86 (1923)], the Supreme Court has steadily expanded the uses of the freedom writ [habeas corpus]. No one can now predict with certainty what are the outer reaches of the concept of custody 'in violation of the Constitution or laws or treaties of the United States.' [28 U.S.C. § 2241(c)(3)]." Reitz, *supra*, n. 67, 1354-55.